

CHAPTER 2016-36

Committee Substitute for Committee Substitute for Senate Bill No. 86

An act relating to scrutinized companies; creating s. 215.4725, F.S.; providing definitions; requiring the State Board of Administration to identify all companies that are boycotting Israel or are engaged in a boycott of Israel in which the public fund owns direct or indirect holdings by a specified date; requiring the public fund to create and maintain the Scrutinized Companies that Boycott Israel List that names all such companies; requiring the public fund to provide written notice to a company that is identified as a scrutinized company; specifying the contents of the notice; specifying circumstances under which a company may be removed from the list; prohibiting the acquisition of certain securities of scrutinized companies; prescribing reporting requirements; requiring that certain information be included in the investment policy statement; authorizing the public fund to invest in certain scrutinized companies if the value of all assets under management by the public fund becomes equal to or less than a specified amount; requiring the public fund to provide a written report to the board of trustees of the state board and the Legislature before such investment occurs; specifying required contents of the report; reenacting and amending s. 287.135, F.S., relating to the prohibition against contracting with scrutinized companies; providing a definition; prohibiting a state agency or local governmental entity from contracting for goods and services that exceed a specified amount if the company has been placed on the Scrutinized Companies that Boycott Israel List; requiring inclusion of a contract provision that authorizes termination of a contract if a company submits certain false certification, has been placed on the scrutinized companies list, or is engaged in a boycott of Israel; providing exceptions; requiring certification upon submission of a bid or proposal for certain contracts, or before a company enters into or renews certain contracts, with an agency or local governmental entity that the company is not participating in a boycott of Israel; providing procedures upon determination that a company has submitted a false certification; providing for civil action; providing penalties; providing attorney fees and costs; providing a statute of repose; prohibiting a private right of action; providing for preemption of conflicting ordinances and rules; revising provisions relating to federal preemption; providing for severability; providing effective dates.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 215.4725, Florida Statutes, is created to read:

215.4725 Prohibited investments by the State Board of Administration; companies that boycott Israel.—

(1) DEFINITIONS.—As used in this section, the term:

(a) “Boycott Israel” or “boycott of Israel” means refusing to deal, terminating business activities, or taking other actions to limit commercial relations with Israel, or persons or entities doing business in Israel or in Israeli-controlled territories, in a discriminatory manner. A statement by a company that it is participating in a boycott of Israel, or that it has initiated a boycott in response to a request for a boycott of Israel or in compliance with, or in furtherance of, calls for a boycott of Israel, may be considered by the State Board of Administration to be evidence that a company is participating in a boycott of Israel. The term does not include restrictive trade practices or boycotts fostered or imposed by foreign countries against Israel.

(b) “Company” means a sole proprietorship, organization, association, corporation, partnership, joint venture, limited partnership, limited liability partnership, limited liability company, or other entity or business association, including all wholly owned subsidiaries, majority-owned subsidiaries, and parent companies, that exists for the purpose of making profit.

(c) “Direct holdings” in a company means all securities of that company that are held directly by the public fund or in an account or fund in which the public fund owns all shares or interests.

(d) “Indirect holdings” in a company means all securities of that company that are held in a commingled fund or other collective investment, such as a mutual fund, in which the public fund owns shares or interests, together with other investors not subject to this section or which are held in an index fund.

(e) “Public fund” means all funds, assets, trustee, and other designates under the State Board of Administration pursuant to part I of chapter 121.

(f) “Scrutinized companies” means companies that boycott Israel or engage in a boycott of Israel.

(2) IDENTIFICATION OF COMPANIES.—

(a) By August 1, 2016, the public fund shall make its best efforts to identify all scrutinized companies in which the public fund has direct or indirect holdings or could possibly have such holdings in the future. Such efforts include:

1. To the extent that the public fund finds it appropriate, reviewing and relying on publicly available information regarding companies that boycott Israel, including information provided by nonprofit organizations, research firms, international organizations, and government entities;

2. Contacting asset managers contracted by the public fund for information regarding companies that boycott Israel; or

3. Contacting other institutional investors that prohibit such investments or that have engaged with companies that boycott Israel.

(b) By the first meeting of the public fund following the identification of scrutinized companies in accordance with paragraph (a), the public fund shall compile and make available the “Scrutinized Companies that Boycott Israel List.”

(c) The public fund shall update and make publicly available quarterly the Scrutinized Companies that Boycott Israel List based on evolving information from, among other sources, those listed in paragraph (a).

(3) REQUIRED ACTIONS.—The public fund shall adhere to the following procedures for assembling companies on the Scrutinized Companies that Boycott Israel List.

(a) *Engagement.*—

1. The public fund shall immediately determine the companies on the Scrutinized Companies that Boycott Israel List in which the public fund owns direct or indirect holdings.

2. For each company newly identified under this paragraph after August 1, 2016, the public fund shall send a written notice informing the company of its scrutinized company status and that it may become subject to investment prohibition by the public fund. The notice must inform the company of the opportunity to clarify its activities regarding the boycott of Israel and encourage the company to cease the boycott of Israel within 90 days in order to avoid qualifying for investment prohibition.

3. If, within 90 days after the public fund’s first engagement with a company pursuant to this paragraph, the company ceases a boycott of Israel, the company shall be removed from the Scrutinized Companies that Boycott Israel List, and the provisions of this section shall cease to apply to that company unless that company resumes a boycott of Israel.

(b) *Prohibition.*—The public fund may not acquire securities of companies on the Scrutinized Companies that Boycott Israel List, except as provided in paragraph (c) and subsection (6).

(c) *Excluded securities.*—Notwithstanding the provisions of this section, paragraph (b) does not apply to:

1. Indirect holdings. However, the public fund shall submit letters to the managers of such investment funds containing companies that boycott Israel requesting that they consider removing such companies from the fund or create a similar fund having indirect holdings devoid of such companies. If the manager creates a similar fund, the public fund shall replace all applicable investments with investments in the similar fund in an expedited timeframe consistent with prudent investing standards. For the purposes of this section, an alternative investment, as the term is defined in s. 215.4401, and securities that are not publicly traded are deemed to be indirect holdings.

2. Exchange-traded funds.

(4) REPORTING.—

(a) The public fund shall file a report with each member of the Board of Trustees of the State Board of Administration, the President of the Senate, and the Speaker of the House of Representatives which includes the Scrutinized Companies that Boycott Israel List within 30 days after the list is created. This report shall be made available to the public.

(b) At each quarterly meeting of the Board of Trustees thereafter, the public fund shall file a report, which shall be made available to the public and to each member of the Board of Trustees of the State Board of Administration, the President of the Senate, and the Speaker of the House of Representatives, which includes:

1. A summary of correspondence with companies engaged by the public fund under subparagraph (3)(a)2.;

2. All prohibited investments under paragraph (3)(b);

3. Any progress made under paragraph (3)(c); and

4. A list of all publicly traded securities held directly by the public fund.

(5) INVESTMENT POLICY STATEMENT OBLIGATIONS.—The public fund's actions taken in compliance with this section, including all good faith determinations regarding companies as required by this act, shall be adopted and incorporated into the public fund's investment policy statement as provided in s. 215.475.

(6) INVESTMENT IN CERTAIN SCRUTINIZED COMPANIES.—Notwithstanding any other provision of this section, the public fund may invest in certain scrutinized companies if clear and convincing evidence shows that the value of all assets under management by the public fund becomes equal to or less than 99.50 percent, or 50 basis points, of the hypothetical value of all assets under management by the public fund, assuming no investment prohibition for any company had occurred under paragraph (3)(b). Cessation of the investment prohibition and any new investment in a scrutinized company is limited to the minimum steps necessary to avoid the contingency described in this subsection. For any cessation of the investment prohibition and new investment authorized by this subsection, the public fund shall provide a written report to each member of the Board of Trustees of the State Board of Administration, the President of the Senate, and the Speaker of the House of Representatives in advance of the new investment, updated semiannually thereafter as applicable, setting forth the reasons and justification, supported by clear and convincing evidence, for its decisions to cease the investment prohibition in scrutinized companies.

Section 2. Effective October 1, 2016, section 287.135, Florida Statutes, is reenacted and amended to read:

287.135 Prohibition against contracting with scrutinized companies.—

(1) In addition to the terms defined in ss. 287.012 and 215.473, as used in this section, the term:

(a) "Awarding body" means, for purposes of state contracts, an agency or the department, and for purposes of local contracts, the governing body of the local governmental entity.

(b) "Boycott of Israel" has the same meaning as defined in s. 215.4725.

~~(c)~~(b) "Business operations" means, for purposes specifically related to Cuba or Syria, engaging in commerce in any form in Cuba or Syria, including, but not limited to, acquiring, developing, maintaining, owning, selling, possessing, leasing, or operating equipment, facilities, personnel, products, services, personal property, real property, military equipment, or any other apparatus of business or commerce.

~~(d)~~(e) "Local governmental entity" means a county, municipality, special district, or other political subdivision of the state.

(2) A company is ineligible to, and may not, bid on, submit a proposal for, or enter into or renew a contract with an agency or local governmental entity for goods or services of \$1 million or more if that, at the time of bidding or submitting a proposal for a new contract or renewal of an existing contract, the company:

(a) Is on the Scrutinized Companies that Boycott Israel List, created pursuant to s. 215.4725, or is engaged in a boycott of Israel;

(b) Is on the Scrutinized Companies with Activities in Sudan List or the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List, created pursuant to s. 215.473; or

(c) Is engaged in business operations in Cuba or Syria, ~~is ineligible for, and may not bid on, submit a proposal for, or enter into or renew a contract with an agency or local governmental entity for goods or services of \$1 million or more.~~

(3)(a) Any contract with an agency or local governmental entity for goods or services of \$1 million or more entered into or renewed on or after:

(a) July 1, 2011, through June 30, 2012, must contain a provision that allows for the termination of such contract at the option of the awarding body if the company is found to have submitted a false certification as provided under subsection (5) or been placed on the Scrutinized Companies with Activities in Sudan List or the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List.

(b) ~~Any contract with an agency or local governmental entity for goods or services of \$1 million or more entered into or renewed on or after July 1,~~

2012, through September 30, 2016, must contain a provision that allows for the termination of such contract at the option of the awarding body if the company is found to have submitted a false certification as provided under subsection (5), been placed on the Scrutinized Companies with Activities in Sudan List or the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List, or been engaged in business operations in Cuba or Syria.

(c) October 1, 2016, must contain a provision that allows for the termination of such contract at the option of the awarding body if the company:

1. Is found to have submitted a false certification as provided under subsection (5);

2. Has been placed on the Scrutinized Companies that Boycott Israel List, or is engaged in a boycott of Israel;

3. Has been placed on the Scrutinized Companies with Activities in Sudan List or the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List; or

4. Has been engaged in business operations in Cuba or Syria.

(4) Notwithstanding subsection (2) or subsection (3), an agency or local governmental entity, on a case-by-case basis, may permit a company on the Scrutinized Companies that Boycott Israel List, the Scrutinized Companies with Activities in Sudan List or the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List, or a company with business operations in Cuba or Syria, to be eligible for, bid on, submit a proposal for, or enter into or renew a contract for goods or services of \$1 million or more under the conditions set forth in paragraph (a) or the conditions set forth in paragraph (b):

(a)1. With respect to a company on the Scrutinized Companies with Activities in Sudan List or the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List, all of the following occur:

a. The scrutinized business operations were made before July 1, 2011.

b. The scrutinized business operations have not been expanded or renewed after July 1, 2011.

c. The agency or local governmental entity determines that it is in the best interest of the state or local community to contract with the company.

d. The company has adopted, has publicized, and is implementing a formal plan to cease scrutinized business operations and to refrain from engaging in any new scrutinized business operations.

2. With respect to a company engaged in business operations in Cuba or Syria, all of the following occur:

- a. The business operations were made before July 1, 2012.
- b. The business operations have not been expanded or renewed after July 1, 2012.
- c. The agency or local governmental entity determines that it is in the best interest of the state or local community to contract with the company.
- d. The company has adopted, has publicized, and is implementing a formal plan to cease business operations and to refrain from engaging in any new business operations.

3. With respect to a company on the Scrutinized Companies that Boycott Israel List, all of the following occur:

- a. The boycott of Israel was initiated before October 1, 2016.
- b. The company certifies in writing that it has ceased its boycott of Israel.
- c. The agency or local governmental entity determines that it is in the best interest of the state or local community to contract with the company.
- d. The company has adopted, has publicized, and is implementing a formal plan to cease scrutinized business operations and to refrain from engaging in any new scrutinized business operations.

(b) One of the following occurs:

1. The local governmental entity makes a public finding that, absent such an exemption, the local governmental entity would be unable to obtain the goods or services for which the contract is offered.

2. For a contract with an executive agency, the Governor makes a public finding that, absent such an exemption, the agency would be unable to obtain the goods or services for which the contract is offered.

3. For a contract with an office of a state constitutional officer other than the Governor, the state constitutional officer makes a public finding that, absent such an exemption, the office would be unable to obtain the goods or services for which the contract is offered.

(5) At the time a company submits a bid or proposal for a contract or before the company enters into or renews a contract with an agency or governmental entity for goods or services of \$1 million or more, the company must certify that the company is not participating in a boycott of Israel, on the Scrutinized Companies with Activities in Sudan List or the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List, or that it does not have business operations in Cuba or Syria.

(a) If, after the agency or the local governmental entity determines, using credible information available to the public, that the company has submitted a false certification, the agency or local governmental entity shall provide the company with written notice of its determination. The company shall have 90 days following receipt of the notice to respond in writing and to demonstrate that the determination of false certification was made in error. If the company does not make such demonstration within 90 days after receipt of the notice, the agency or the local governmental entity shall bring a civil action against the company. If a civil action is brought and the court determines that the company submitted a false certification, the company shall pay the penalty described in subparagraph 1. and all reasonable attorney fees and costs, including any costs for investigations that led to the finding of false certification.

1. A civil penalty equal to the greater of \$2 million or twice the amount of the contract for which the false certification was submitted shall be imposed.

2. The company is ineligible to bid on any contract with an agency or local governmental entity for 3 years after the date the agency or local governmental entity determined that the company submitted a false certification.

(b) A civil action to collect the penalties described in paragraph (a) must commence within 3 years after the date the false certification is submitted.

(6) Only the agency or local governmental entity that is a party to the contract may cause a civil action to be brought under this section. This section does not create or authorize a private right of action or enforcement of the penalties provided in this section. An unsuccessful bidder, or any other person other than the agency or local governmental entity, may not protest the award of a contract or contract renewal on the basis of a false certification.

(7) This section preempts any ordinance or rule of any agency or local governmental entity involving public contracts for goods or services of \$1 million or more with a company engaged in scrutinized business operations.

(8) The contracting prohibitions in this section applicable to companies on the Scrutinized Companies with Activities in Sudan List or the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List or to companies engaged in business operations in Cuba or Syria become ~~This section becomes~~ inoperative on the date that federal law ceases to authorize the states to adopt and enforce such the contracting prohibitions of ~~the type provided for in this section.~~

Section 3. If any provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared severable.

Section 4. Except as otherwise expressly provided in this act, this act shall take effect upon becoming a law.

Approved by the Governor March 10, 2016.

Filed in Office Secretary of State March 10, 2016.